

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
SOUTHERN DIVISION

WILLIAM S. HILO,	}	Case No. SACV 17-00395-JDE
Plaintiff,		MEMORANDUM OPINION AND ORDER
v.		
NANCY A. BERRYHILL, Acting Commissioner of Social Security,		
Defendant.		

Plaintiff William S. Hilo (“Plaintiff”) filed a Complaint on March 7, 2017, seeking review of the Commissioner’s denial of his applications for disability insurance benefits (“DIB”) and supplemental security income (“SSI”). The parties filed consents to proceed before the undersigned Magistrate Judge. In accordance with the Court’s Order Re: Procedures in Social Security Appeal, the parties filed a Joint Submission (“Jt. Sub.”) on January 31, 2018, addressing their respective positions. The Court has taken the Joint Submission under submission without oral argument and as such, this matter now is ready for decision.

1 I.

2 BACKGROUND

3 Plaintiff applied for DIB on December 12, 2013 and SID on July 18,  
4 2014, alleging disability on April 4, 2012 in both applications. (Administrative  
5 Record [“AR”] 11, 167-77.) After his applications were denied initially (AR  
6 84) and on reconsideration (AR 115), Plaintiff requested an administrative  
7 hearing, which was held on June 4, 2015. (AR 29-55, 128-29.) Plaintiff,  
8 represented by counsel, appeared and testified at the hearing before an  
9 Administrative Law Judge (“ALJ”). (AR 29-55.)

10 On July 8, 2015, the ALJ issued a written decision finding Plaintiff was  
11 not disabled. (AR 8-24.) The ALJ found that Plaintiff had not engaged in  
12 substantial gainful activity since April 4 and suffered from the following severe  
13 impairments: obesity, right rotator cuff tear, lumbar spondylosis, right hip  
14 bursitis, mild degenerative changes of the left knee, and mild acromioclavicular  
15 (AC) joint degenerative disease. (AR 13.) The ALJ found that Plaintiff did not  
16 have an impairment or combination of impairments that met or medically  
17 equaled a listed impairment. (AR 17.) The ALJ also found that Plaintiff had  
18 the residual functional capacity (“RFC”) to perform light work, with the  
19 following limitations: Plaintiff could (1) lift and/or carry 20 pounds  
20 occasionally and 10 pounds frequently; (2) stand, walk, or sit for six hours out  
21 of an eight-hour workday; (3) occasionally push and/or pull with the right  
22 upper extremity; (4) frequently climb ramps or stairs, balance, stoop, kneel, or  
23 crouch; (5) occasionally climb ladders, ropes, or scaffolds, or crawl; (6)  
24 occasionally lift overhead with the right upper extremity up to 10 pounds  
25 occasionally and less than 10 pounds frequently; and (7) must avoid  
26 concentrated exposure to extreme cold, excessive vibration, and workplace  
27 hazards, such as moving machinery and unprotected heights. (AR 17-18.) The  
28 ALJ further found that Plaintiff was capable of performing past relevant work

1 as a car salesman and gas station owner/manager. (AR 23.) Accordingly, the  
2 ALJ concluded that Plaintiff was not under a “disability,” as defined in the  
3 Social Security Act. (AR 24.)

4 Plaintiff filed a request with the Appeals Council for review of the ALJ’s  
5 decision. (AR 7.) On January 17, 2017, the Appeals Council denied Plaintiff’s  
6 request for review, making the ALJ’s decision the Commissioner’s final  
7 decision. (AR 1-6.) This action followed.

## 8 II.

### 9 STANDARD OF REVIEW

10 Under 42 U.S.C. § 405(g), a district court may review a decision to deny  
11 benefits. An ALJ’s findings should be upheld if they are free from legal error  
12 and supported by substantial evidence based on the record as a whole. Brown-  
13 Hunter v. Colvin, 806 F.3d 487, 492 (9th Cir. 2015) (as amended); Parra v.  
14 Astrue, 481 F.3d 742, 746 (9th Cir. 2007). Substantial evidence is such relevant  
15 evidence as a reasonable person might accept as adequate to support a  
16 conclusion. Lingenfelter v. Astrue, 504 F.3d 1028, 1035 (9th Cir. 2007). It is  
17 more than a scintilla, but less than a preponderance. Id. To determine whether  
18 substantial evidence supports a finding, the reviewing court “must review the  
19 administrative record as a whole, weighing both the evidence that supports and  
20 the evidence that detracts from the Commissioner’s conclusion.” Reddick v.  
21 Chater, 157 F.3d 715, 720 (9th Cir. 1998). “If the evidence can reasonably  
22 support either affirming or reversing,” the reviewing court “may not substitute  
23 its judgment” for that of the Commissioner. Id. at 720-21; see also Molina v.  
24 Astrue, 674 F.3d 1104, 1111 (9th Cir. 2012) (“Even when the evidence is  
25 susceptible to more than one rational interpretation, [the court] must uphold  
26 the ALJ’s findings if they are supported by inferences reasonably drawn from  
27 the record.”). However, a court may review only the reasons stated by the ALJ  
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1 in his decision “and may not affirm the ALJ on a ground upon which he did  
2 not rely.” Orn v. Astrue, 495 F.3d 625, 630 (9th Cir. 2007).

3 Even if an ALJ errs, the decision will be upheld if the error is harmless.  
4 Molina, 674 F.3d at 1115. An error is harmless if it is “inconsequential to the  
5 ultimate nondisability determination,” or if “the agency’s path may reasonably  
6 be discerned, even if the agency explains its decision with less than ideal  
7 clarity.” Brown-Hunter, 806 F.3d at 492 (citation omitted).

### 8 III.

### 9 DISCUSSION

10 The parties present three disputed issues (Jt. Sub. at 1-2):

11 Issue No. 1: Whether the ALJ erred by finding Plaintiff’s mental  
12 impairment non-severe;

13 Issue No. 2: Whether the ALJ committed legal error in not adequately  
14 assessing Plaintiff’s testimony regarding his pain and limitations; and

15 Issue No. 3: Whether the ALJ failed to consider the State Agency  
16 determinations.

17 As explained below, the Court agrees with Plaintiff, in part, and  
18 remands for further proceedings.

#### 19 A. Step Two Finding Regarding Plaintiff’s Mental Impairment

20 At step two of the sequential evaluation, the ALJ determines whether the  
21 claimant has a severe, medically determinable impairment or combination of  
22 impairments that meets the durational requirement. See 20 C.F.R. §§  
23 404.1520(a)(4)(ii), 416.920(a)(4)(ii). In assessing severity, the ALJ must  
24 determine whether the claimant’s medically determinable impairment or  
25 combinations of impairments significantly limits his ability to do basic work  
26 activities. See Webb v. Barnhart, 433 F.3d 683, 686 (9th Cir. 2005). Step two is  
27 a “de minimis screening device to dispose of groundless claims.” Smolen v.  
28 Chater, 80 F.3d 1273, 1290 (9th Cir. 1996). An impairment or combination of

1 impairments may be found “not severe *only if* the evidence establishes a slight  
2 abnormality that has no more than a minimal effect on an individual’s ability  
3 to work.” Webb, 433 F.3d at 686 (quoting Smolen, 80 F.3d at 1290). The ALJ  
4 “may find that a claimant lacks a medically severe impairment or combination  
5 of impairments only when [that] conclusion is ‘clearly established by medical  
6 evidence.’” Id. at 687 (citation omitted).

7       The ALJ found that Plaintiff had medically determinable mental  
8 impairments of adjustment disorder with mixed anxiety and depressed mood,  
9 post-traumatic stress disorder, schizoaffective disorder, generalized anxiety  
10 disorder, and major depressive disorder, but that those impairments,  
11 considered singly and in combination, did not cause more than minimal  
12 limitation in Plaintiff’s ability to perform basic mental work activities and as  
13 such, were non-severe. (AR 14.) The ALJ found that Plaintiff had no more  
14 than mild limitations in the first three broad functional areas used to determine  
15 severity – activities of daily living, social functioning, and concentration,  
16 persistence, or pace – and no episodes of decompensation that have been of  
17 extended duration in the fourth area. (AR 14-15.)

18       Plaintiff contends that the ALJ failed to properly consider the medical  
19 opinions of workers’ compensation physicians Drs. Edwin C. Peck and David  
20 R. Kauss, State Agency physicians Drs. D. Funkenstein and Robert Liss, and  
21 the opinion of treating physician, Dr. Eleni Hailemariam. (Jt. Sub. at 3-9.)

22       Several reports were prepared in connection with Plaintiff’s claim for  
23 workers’ compensation benefits. Dr. Peck conducted psychiatric evaluations in  
24 December 2012 and September 2013. (AR 481-532.) In January 2013, Dr.  
25 Peck: (a) diagnosed Plaintiff with post-traumatic stress disorder, schizoaffective  
26 disorder, and generalized anxiety disorder; (b) concluded that Plaintiff was  
27 temporarily totally disabled from April 11, 2012 to December 18, 2012; and (c)  
28 opined that it was medically probable that Plaintiff would remain temporarily

1 totally disabled until he began psychiatric treatment. (AR 524, 526.) In  
2 September, Dr. Peck diagnosed Plaintiff with a major depressive disorder,  
3 recurrent, severe, without psychotic features, generalized anxiety disorder, and  
4 somatization disorder, with prominent hypochondriacal features. Dr. Peck also  
5 noted that Plaintiff suffers from a personality prototype, “most probably with  
6 schizotypal and avoidant personality features.” (AR 501.) Dr. Peck noted that  
7 Plaintiff was oriented to time, place, and person; spoke clearly; his mood was  
8 depressed; his memory was at an adequate to good level; his intelligence was  
9 slightly above average; he became more insightful as the interview progressed;  
10 he was able to manage his own funds; and did not have any plans or intentions  
11 of harming or killing himself or anyone else. (AR 497-98.)

12 Dr. Kauss conducted a psychological evaluation in April 2014 in  
13 connection with the workers’ compensation claim. (AR 590-608.) Dr. Kauss  
14 noted that Plaintiff was well-groomed, polite, and cooperative during the  
15 evaluation; his mood was anxious with evidence of underlying depression;  
16 affect was consistent with mood and appropriate to thought content; he  
17 reported suicidal ideation, but denied plan or intent; he had some difficulty  
18 recalling dates, details, sequence of events, and medical treatment; immediate  
19 stream of thought was rational, relevant, and coherent; assessment of reality  
20 was within normal limits; insight and social judgments were within normal  
21 limits; and intelligence was in the above average range. (AR 596-97.) Results  
22 from the Epworth Sleepiness Scale suggested an abnormal level of daytime  
23 sleepiness, raising the possibility of a sleep disorder. (AR 599.) Dr. Kauss  
24 diagnosed Plaintiff with unspecified anxiety disorder with depression, male  
25 hypoactive sexual desire disorder, and noted psychological factors affecting  
26 another medical condition. (AR 600.) Plaintiff scored a 19 on the Beck  
27 Depression Inventory, consistent with a mild level of depression and his  
28 response score on the Beck Anxiety Inventory was consistent with a severe

1 level of anxiety. (AR 598.) Based on the information available to Dr. Kauss at  
2 that time, he concluded that Plaintiff was temporarily totally disabled since  
3 April 4, 2012 and continuing, except for a period of time he attempted to work  
4 for several auto dealerships. He further opined that he had not reached the  
5 point of maximal medical improvement and recommended treatment. (AR  
6 606-07.) Although Dr. Kauss requested authorization to implement a  
7 treatment plan for Plaintiff (AR 607), there are no treatment records or  
8 evidence reflecting that the authorization was approved.

9 Another workers' compensation evaluation was conducted by Dr.  
10 Dmitriy Sivtsov in October 2014. (AR 611-66.) Dr. Sivtsov noted that Plaintiff  
11 was calm, cooperative, and offered good eye contact during the interview; he  
12 was somewhat guarded and abbreviated when he spoke about the injurious  
13 events outside the workers' compensation case; he described his mood as  
14 "today is not a bad day"; his affect was of full range, minimally restricted, and  
15 mostly near euthymic; his thought content was full of preoccupation with the  
16 events he perceived as harassment while working at the Honda dealership;  
17 there were no signs of major psychopathology or psychotic inclusions in his  
18 thought content; his thought process was logical and goal directed; and he was  
19 fully oriented to person, place, time, and situation. He denied having suicidal  
20 or homicidal ideation at that time. Dr. Sivtsov found Plaintiff's reliability as a  
21 historian less than satisfactory. (AR 623-24.) Results from the Beck Depression  
22 Inventory indicated the possibility of moderate depression, the results of the  
23 Beck Anxiety Disorder suggested the possibility of severe anxiety, and results  
24 from the Epworth Sleepiness Score indicated the possibility of some problems  
25 with daytime sleepiness. (AR 627-28.) Plaintiff's test responses were most  
26 consistent with the following diagnoses: depressive disorder, anxiety disorder,  
27 adjustment disorder, and somatoform disorder. (AR 628.) In summarizing  
28 Plaintiff's deposition testimony previously provided in April 2014, Dr. Sivtsov

1 noted that Plaintiff indicated at the deposition that he no longer suffered from  
2 depression and anxiety. (AR 648.) Dr. Sivtsov diagnosed Plaintiff with an  
3 adjustment disorder with mixed anxiety and depressed mood, chronic. (AR  
4 650.) He noted that he was lacking any convincing evidence that there was a  
5 period of time when Plaintiff had a degree of psychopathology that would have  
6 made him totally temporarily disabled psychiatrically. (AR 656.) With respect  
7 to possible partial temporary disability, Dr. Sivtsov noted that it seemed that  
8 Plaintiff “had been subjectively affected by the events perceived as harassment  
9 and humiliation at work that had a negative effect on his relationship at home,  
10 sleep, and amplified his pre-existing gastrointestinal condition by way of  
11 wrong food choices. He was also not motivated and tearful.” As such, Dr.  
12 Sivtsov concluded that there was a period of temporary partial disability  
13 psychiatrically from June or July 2011 and ending the date of the evaluation.  
14 (AR 656.) He opined that Plaintiff had reached the level of maximum medical  
15 improvement and was permanent and stationary as of the date of the  
16 evaluation. (AR 657.) He further opined that Plaintiff had mild impairment  
17 with regard to activities of daily living, no to mild impairment with regard to  
18 social functioning and concentration, and no impairment with regard to  
19 adaptation. (AR 658-60.) He recommended psychotherapy, but noted that it  
20 remained unclear whether Plaintiff was seriously interested in  
21 psychopharmacological treatments and did not recommend such treatments.  
22 (AR 663.) Dr. Sivtsov concluded by stating that Plaintiff was ready to join the  
23 workforce despite residual emotional symptoms. (AR 664.)

24 Dr. Kauss completed a supplemental report in February 2015 after  
25 reviewing Dr. Sivtsov’s report. (AR 668-75.) He indicated that although his  
26 diagnosis differed somewhat from Dr. Sivtsov’s diagnosis, they both found that  
27 Plaintiff developed clinically significant anxiety and depression as a result of  
28 work-related stressors. (AR 674.)



1       The ALJ gave great weight to the opinion of Dr. Sivtsov, concluding that  
2 his opinion was consistent with Plaintiff's mental health treatment records,  
3 which showed minimal mental health treatment and several mental status  
4 examination results grossly within normal limits. (AR 16.) The ALJ gave little  
5 weight to the opinions of Drs. Peck and Kauss, and noted that they examined  
6 Plaintiff solely in the context of a workers' compensation claim, "which affects  
7 the relevance of their opinions." (AR 17.) The ALJ found their temporarily  
8 totally disabled conclusions had no probative value and their opinions were  
9 inconsistent with Plaintiff's mental health treatment records as a whole, which  
10 revealed inconsistent mental health treatment. (Id.)

11       Plaintiff contends that it was error to treat workers' compensation  
12 physicians with suspicion. (Jt. Sub. 3.) Plaintiff argues that the ALJ's finding  
13 that the fact that Drs. Peck and Kauss examined Plaintiff solely in the context  
14 of a workers' compensation claim affects the relevance of their opinions  
15 warrants remand because "this error undermines her entire decision making  
16 process concerning evaluation of opinion evidence." (Id.) The Court disagrees.  
17 Although an ALJ may not disregard a physician's opinion merely because it  
18 was initially elicited in a state workers' compensation proceeding, Booth v.  
19 Barnhart, 181 F. Supp. 2d 1099, 1105 (C.D. Cal. 2002), an ALJ is not bound  
20 to accept or apply a workers' compensation physician's status designation,  
21 such as temporarily totally disabled, because such terms of art are "not  
22 equivalent to Social Security disability terminology." Sanchez v. Berryhill,  
23 2017 WL 5508515, at \*5 (C.D. Cal. Nov. 16, 2017) (citation omitted); see also  
24 Booth, 181 F. Supp. 2d at 1104. Here, it is not clear that the ALJ discounted  
25 their opinions on the basis that their opinions were elicited for purposes of the  
26 workers' compensation claim, considering that the ALJ otherwise gave great  
27 weight to the opinion of Dr. Sivtsov, another workers' compensation  
28 physician. Nevertheless, the ALJ otherwise provided a specific and legitimate

1 reason supported by substantial evidence for giving little weight to the  
2 contradicted opinions of these examining physicians.<sup>1</sup> See Lester v. Chater, 81  
3 F.3d 821, 830-31 (9th Cir. 1996) (as amended).

4 Here, the ALJ discounted Drs. Peck and Kauss's opinions because they  
5 were inconsistent with Plaintiff's mental health treatment records as a whole,  
6 which reflected inconsistent mental health treatment. (AR 17.) This was a  
7 proper basis for rejecting their opinions.

8 The only evidence of mental health treatment was for a six-month period  
9 in 2013. In June 2013, Plaintiff sought mental health treatment with the  
10 County of Orange, Behavioral Health Services. At that time, Plaintiff reported  
11 panic attacks, depression, irritable mood, anxiety, and poor concentration.  
12 (AR 567, 569.) In August 2013, Plaintiff reported that he had been depressed  
13 since losing his job and was sleeping poorly. He denied hopelessness,  
14 helplessness, and suicidal ideation intent or plan. Dr. Hailemariam prescribed  
15 Trazadone. (AR 573-74.) In September 2013, Plaintiff reported to Dr.  
16 Hailemariam that he was sleeping better and feeling less depressed since  
17 starting Trazadone. (AR 570.) However, he reported to his therapist, Zahra  
18 Heydari, that he was not happy about his medication and was feeling  
19 depressed. (AR 564.) In October 2013, he reported no significant improvement  
20 in depression or sleep and Dr. Hailemariam prescribed Celexa, in addition to  
21 Trazadone. (AR 572.) In November 2013, Plaintiff reported that he was not  
22 sleeping, but after further inquiry, he disclosed he had been taking only one  
23 Trazadone tablet. Plaintiff gave Dr. Hailemariam a form to complete so he  
24 could get permanent disability benefits. He was referred to therapist Heydari.

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26 <sup>1</sup> The Court rejects Plaintiff's characterization of Dr. Kauss as a treating physician.  
27 (Jt. Sub. at 5.) Although he requested authorization to implement a treatment plan,  
28 there is no evidence that authorization was provided or that a treating relationship  
was established.

1 (AR 571.) Therapist Heydari indicated that Plaintiff looked calm and did not  
2 present any symptoms of depression. (AR 563.) On the same date, Heydari  
3 talked with Dr. Hailemariam, who stated that Plaintiff did not seem depressed  
4 and questioned his motivations for seeking therapy, explaining that it looked  
5 like he wanted to stay in the program so that he could get disability benefits.  
6 Heydari followed up with Plaintiff, who stated that he would get his  
7 medications from his primary care physician and would like to close his case.  
8 (AR 562.) Plaintiff's case was closed in December 2013. (AR 561.)

9       There is no evidence of any further mental health treatment. On this  
10 record, the ALJ reasonably concluded that Plaintiff's inconsistent mental  
11 health treatment contradicted Drs. Peck's and Kauss's opinions. See Adcock v.  
12 Berryhil, 2017 WL 2469355, at \*11-12 (C.D. Cal. June 6, 2017) (ALJ  
13 reasonably concluded that plaintiff's failure to seek mental health treatment  
14 contradicted medical opinion).

15       Citing to Nguyen v. Chater, 100 F.3d 1462 (9th Cir. 1996), Plaintiff  
16 argues that lack of treatment is an insufficient basis for rejecting Drs. Peck's  
17 and Kauss's opinions. (Jt. Sub. at 5.) Nguyen is distinguishable. In that case,  
18 the ALJ discounted evidence of depression because the claimant failed to seek  
19 treatment for any mental disorder "until late in the day." The Ninth Circuit  
20 held that this was not a substantial basis for rejecting the medical opinion,  
21 explaining that "it is a questionable practice to chastise one with a mental  
22 impairment for the exercise of poor judgment in seeking rehabilitation."  
23 Nguyen, 100 F.3d at 1465 (citation omitted). Here, Plaintiff has sought  
24 treatment in the past, after Dr. Peck recommended mental health treatment  
25 (AR 495), but discontinued treatment after his treating physician suggested he  
26 was only seeking treatment for purposes of a disability claim. Although  
27 Plaintiff claimed at the hearing that the reason he discontinued treatment was  
28 because they could not do anything else for him since he was not "crippled"

1 (AR 46), the treatment notes indicate that Dr. Hailemariam opined that  
2 Plaintiff did not seem depressed and wanted to stay in the program so he could  
3 get disability benefits. (AR 561-62.) The ALJ noted that the medical records  
4 seemed to indicate that Plaintiff did not want to go to the county facility  
5 because there were a lot of homeless people, but Plaintiff stated at the hearing  
6 that “they didn’t even recommend it.” (AR 46.)<sup>2</sup> Although it is not clear  
7 whether Plaintiff is referring to the county physician regarding further  
8 treatment, all three workers’ compensation physicians recommended further  
9 treatment (see AR 501 (9/16/13 recommendation from Dr. Peck that Plaintiff  
10 obtain further mental health treatment); AR 607 (5/14/14 recommendation  
11 from Dr. Kauss for mental health treatment); AR 663 (10/27/14  
12 recommendation from Dr. Sivtsov for mental health treatment)) and Plaintiff  
13 reported to Dr. Sivtsov that the county told him that he could return if he  
14 needed. (AR 663.) Even though Plaintiff knew mental health treatment was  
15 available, he chose to ignore the physicians’ advice. Plaintiff’s failure to seek  
16 treatment reasonably suggests that Plaintiff’s symptoms were not as  
17 debilitating as he has alleged. See Molina, 674 F.3d at 1113-14 (ALJ properly  
18 considered the failure to seek mental health treatment); Judge v. Astrue, 2010  
19 WL 3245813, at \*3-4 (C.D. Cal. Aug. 16, 2010) (the ALJ did not err in  
20 considering plaintiff’s failure to seek treatment where her failure to get  
21 treatment after 1997 seemed to be more a function of the fact that she did not  
22 need it, as opposed to an inability to comprehend that she needed it). Because  
23 the ALJ’s conclusion was reasonable, the Court should not disturb it. See  
24 Morgan v. Comm’r of the Soc. Sec. Admin., 169 F.3d 595, 599 (9th Cir. 1999)

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26 <sup>2</sup> Plaintiff also appeared to claim during the administrative hearing that he was not  
27 currently in treatment because he did not have insurance or money (AR 47), but  
28 earlier in the hearing, he expressly testified that he had insurance. (AR 44.)

1 (“Where the evidence is susceptible to more than one rational interpretation, it  
2 is the ALJ’s conclusion that must be upheld.”).

3       The ALJ similarly discounted the opinions of State agency medical  
4 consultants, Drs. Funkenstein and Liss. (AR 17.) Again, this finding was  
5 reasonable. Both Drs. Funkenstein and Liss diagnosed Plaintiff with an  
6 affective disorder and anxiety-related disorder. (AR 91-92, 105-06.) They  
7 found Plaintiff had understanding and memory limitations, sustained  
8 concentration and persistence limitations, no social interaction limitations, and  
9 no adaptation limitations. (AR 95-97, 110-11.) The physicians wrote “srt” in  
10 response to questions asking about the degree of specific understanding and  
11 memory limitations and sustained concentration and persistence limitations.  
12 (*Id.*) Plaintiff states that “srt” means “simple, repetitive tasks” (Jt. Sub. at 6),  
13 although he provides no citation for this contention. In any event, the ALJ  
14 gave little weight to these opinions because they were inconsistent with  
15 Plaintiff’s mental health treatment records. The ALJ cited to the lack of recent  
16 mental health treatment and the fact that Plaintiff was not taking any  
17 medication for his mental impairment. (AR 17.) Plaintiff discontinued mental  
18 health treatment in 2013 and at the administrative hearing, Plaintiff indicated  
19 that he was not taking any medication for his mental impairment. (AR 46.)  
20 The ALJ provided a specific and legitimate basis for rejecting these opinions.

21       Finally, Plaintiff contends that the ALJ failed to consider the opinion  
22 and reporting of Dr. Hailemariam that Plaintiff had a Global Assessment of  
23 Functioning (“GAF”) score of “50 or less.” (Jt. Sub. 7.) The Commissioner  
24 has declined to endorse GAF scores, see 65 Fed. Reg. 50746-01, 50764-65  
25 (Aug. 21, 2000) (“The GAF scale . . . does not have a direct correlation to the  
26 severity requirements in [the Commissioner’s] mental disorders listings.”); see  
27 also Davis v. Colvin, 2015 WL 350283, at \*7 (C.D. Cal. Jan. 26, 2015) (“An  
28 ALJ has no obligation to credit or even consider GAF scores in the disability

determination.”), and the most recent edition of the DSM “dropped” the GAF score, citing its conceptual lack of clarity and questionable psychometrics in practice. Diagnostic & Statistical Manual of Mental Disorders (5th ed.); see also Tate v. Frauenheim, 2017 WL 6463716, at \*6 (C.D. Cal. Nov. 16, 2017) (“GAF scores have been excluded from the latest edition of DSM because of concerns about their reliability and lack of clarity”), Report and Recommendation accepted by 2017 WL 6496419 (C.D. Cal. Dec. 15, 2017). Nevertheless, the Social Security Administration “has said that GAF scores ‘should be considered as medical opinion evidence under 20 C.F.R. §§ 404.1527(a)(2) and 416.927(a)(2) if they come from an acceptable medical source.’” Wellington v. Berryhill, 878 F.3d 867, 871 n.1 (9th Cir. 2017) (citation omitted). Here, the ALJ considered and discussed Dr. Hailemariam’s findings, which included the GAF scores. (AR 16-17.) Thus, the ALJ properly evaluated the medical evidence and did not err in failing to explicitly discuss the GAF scores. See Chavez v. Astrue, 699 F. Supp. 2d 1125, 1135 (C.D. Cal. 2009) (“an ALJ is not required to give controlling weight to a treating physician’s GAF score; indeed, an ALJ’s failure to mention a GAF score does not render his assessment of a claimant’s RFC deficient”).

In sum, the ALJ’s conclusion that Plaintiff’s mental impairment was not severe was supported by substantial evidence in the record.

**B. Plaintiff’s Subjective Symptom Testimony**

Where a disability claimant produces objective medical evidence of an underlying impairment that could reasonably be expected to produce the pain or other symptoms alleged, absent evidence of malingering, the ALJ must provide “‘specific, clear and convincing reasons for’ rejecting the claimant’s testimony regarding the severity of the claimant’s symptoms.” Treichler v. Comm’r of Soc. Sec. Admin., 775 F.3d 1090, 1102 (9th Cir. 2014) (citation omitted); Moisa v. Barnhart, 367 F.3d 882, 885 (9th Cir. 2004); see also 20

1 C.F.R. §§ 404.1529, 416.929. The ALJ’s findings “must be sufficiently specific  
2 to allow a reviewing court to conclude that the [ALJ] rejected [the] claimant’s  
3 testimony on permissible grounds and did not arbitrarily discredit the  
4 claimant’s testimony.” Moisa, 367 F.3d at 885 (citation omitted). However, if  
5 the ALJ’s assessment of the claimant’s testimony is reasonable and is  
6 supported by substantial evidence, it is not the court’s role to “second-guess” it.  
7 See Rollins v. Massanari, 261 F.3d 853, 857 (9th Cir. 2001).<sup>3</sup>

8 Plaintiff completed a function report on January 10, 2014, describing  
9 depression, anxiety, sleeplessness, panic attacks, and pain in his back and  
10 shoulder. (AR 207-08.) He indicated that he only slept three to four hours per  
11 night. (AR 208.) He was able to take care of his personal care without any  
12 problems, but needed reminders, prepared his own meals once every two days,  
13 did laundry with help and encouragement, walked, drove a car, shopped,  
14 handled his own money, played chess, watched television once in a while with  
15 difficulty concentrating, spent time with others, attended church, but became  
16 agitated getting along with others. (AR 208-212.) He indicated his conditions  
17 affected his ability to reach, as well as his memory, ability to complete tasks,  
18 concentrate, understand, follow instructions, use his hands, and get along with  
19 others. (AR 212.) He further indicated he could not lift more than 10 pounds

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20 <sup>3</sup> After the ALJ’s decision, SSR 16-3p went into effect. See SSR 16-3p, 2016 WL  
21 1119029 (Mar. 16, 2016). SSR 16-3p provides that “we are eliminating the use of the  
22 term ‘credibility’ from our sub-regulatory policy, as our regulations do not use this  
23 term.” Id. Moreover, “[i]n doing so, we clarify that subjective symptom evaluation is  
24 not an examination of an individual’s character” and requires that the ALJ consider  
25 all of the evidence in an individual’s record when evaluating the intensity and  
26 persistence of symptoms. Id.; see also Trevizo v. Berryhill, 871 F.3d 664, 678 n.5 (9th  
27 Cir. 2017) (as amended). Thus, the adjudicator “will not assess an individual’s  
28 overall character or truthfulness in the manner typically used during an adversarial  
court litigation. The focus of the evaluation of an individual’s symptoms should not  
be to determine whether he or she is a truthful person.” SSR 16-3p, 2016 WL  
1119029, at \*10.

1 or pay attention for more than 10 minutes, did not handle stress well, but could  
2 handle changes in routine and get along with authority figures. (AR 212-13.)

3 During the administrative hearing, Plaintiff testified that he believed the  
4 reason he had been unable to work since April 2012 was a “mental issue,  
5 harassment and favoritism and humiliations on daily basis[,] [h]ostile  
6 environment.” (AR 35.) He tried to work after April 2012, but felt “like  
7 panicking,” could not sleep at night, slept on the job one time, and was  
8 “stressed out all the time.” (AR 36-37, 42.) He suffered from panic attacks once  
9 in a while, anxiety attacks almost once a month, and if he was stressed, he  
10 could not sleep. (AR 39-40.) He described feeling paranoid and insecure, but  
11 indicated that he did not have trouble interacting with others. (AR 40-41.)

12 Plaintiff also described physical limitations. He testified that he had a  
13 rotator cuff tear in his right shoulder, back pain, “radiation” and pain in his  
14 knees and legs, trouble with movement in his right hand, and could not stand  
15 for more than 10 minutes. (AR 38-39, 44.) He estimated that he could lift or  
16 carry 20 pounds. (AR 38.) He took pain medication every night for his  
17 shoulder, and Aspirin and Tylenol for his back, all of which helped the pain.  
18 (AR 42, 45.) He indicated that he drove every day and did light household  
19 chores. (AR 34, 41.)

20 The ALJ determined Plaintiff’s medically determinable impairments  
21 could reasonably be expected to cause some of the alleged symptoms, but  
22 Plaintiff’s statements “concerning the intensity, persistence[,] and limiting  
23 effects of these symptoms [were] not credible to the extent those statements  
24 [were] inconsistent with the residual capacity assessment herein.” (AR 20.) As  
25 explained below, the ALJ failed to provide legally sufficient reasons for  
26 discrediting Plaintiff’s subjective symptom testimony.

27 First, the ALJ improperly discounted Plaintiff’s subjective symptom  
28 testimony based on his daily activities. The ALJ noted that although Plaintiff’s



1 activities of daily living were somewhat limited, “some of the physical and  
2 mental abilities and social interactions required in order to perform these  
3 activities are the same as those necessary for obtaining and maintaining  
4 employment[.]” (AR 19.) In particular, the ALJ cited to Plaintiff’s ability to  
5 perform personal grooming activities, perform household chores, drive a  
6 vehicle, and shop, explaining that such activities were compatible with  
7 competitive work. (AR 19, 23.) These activities are not inconsistent with  
8 Plaintiff’s testimony regarding his mental impairments, and the ALJ provides  
9 no explanation regarding how these activities undermine Plaintiff’s credibility.  
10 Similarly, the ALJ’s conclusory finding that some of the physical abilities  
11 required to perform Plaintiff’s daily activities are the same as those necessary  
12 for obtaining and maintaining employment does not constitute a specific, clear  
13 and convincing reason supported by substantial evidence for rejecting  
14 Plaintiff’s subjective symptom testimony. The Ninth Circuit has “repeatedly  
15 warned that ALJs must be especially cautious in concluding that daily  
16 activities are inconsistent with testimony about pain, because impairments that  
17 would unquestionably preclude work and all the pressures of a workplace  
18 environment will often be consistent with doing more than merely resting in  
19 bed all day.” Garrison v. Colvin, 759 F.3d 995, 1016 (9th Cir. 2014); Vertigan  
20 v. Halter, 260 F.3d 1044, 1050 (9th Cir. 2001) (“This court has repeatedly  
21 asserted that the mere fact that a plaintiff has carried on certain daily activities,  
22 such as grocery shopping, driving a car, or limited walking for exercise, does  
23 not in any way detract from her credibility as to her overall disability.”).  
24 “[O]nly if [his] level of activity [was] inconsistent with [a claimant’s] claimed  
25 limitations would these activities have any bearing on [his] credibility.”  
26 Garrison, 759 F.3d at 1016. Here, the ALJ erred in relying on Plaintiff’s  
27 reported daily activities without explaining how these activities were  
28 inconsistent with Plaintiff’s subjective symptom complaints.

1       Next, the ALJ discounted Plaintiff's credibility because he attempted to  
2 go back to work on two occasions. (AR 20.) Attempting to work and failing  
3 does not undermine Plaintiff's credibility. Robinson v. Colvin, 666 F. App'x  
4 687, 688 (9th Cir. 2016). Plaintiff explained that in 2013 he attempted to return  
5 to work as a car salesman, but stopped working after a short period of time  
6 because he was having panic attacks, could not sleep at night, and slept at  
7 work. (AR 36, 42.) If anything, Plaintiff's unsuccessful attempt to return to  
8 work supports his allegations of disabling symptoms. Lingenfelter, 504 F.3d at  
9 1038; Robinson, 666 F. App'x at 688.

10       Third, the ALJ found that Plaintiff has not received the type of medical  
11 treatment one would expect for a totally disabled individual. (AR 19.) While  
12 evidence of conservative treatment is sufficient to discount a claimant's  
13 testimony regarding severity of an impairment, Parra, 481 F.3d at 750-51; see  
14 also Tommasetti v. Astrue, 533 F.3d 1035, 1039-40 (9th Cir. 2008), in this  
15 instance, the ALJ's finding is not supported by substantial evidence. The ALJ  
16 provided no explanation for her finding and instead, merely summarized the  
17 objective medical evidence. (AR 19-20.) In addition, the medical records reflect  
18 that rotator cuff surgery was recommended, but Plaintiff could not undergo the  
19 surgery at that time because he was traveling to Australia in order to take care  
20 of his sister, who had cancer. (AR 473-74.) Plaintiff explained at the  
21 administrative hearing that he planned to undergo the surgery and his brother  
22 was initially going to help him financially, but since he now had insurance he  
23 intended to proceed with the surgery. (AR 44.)

24       The only other articulated reason for discounting Plaintiff's symptom  
25 testimony was the lack of corroborating objective medical evidence. (AR 19.)  
26 Because the ALJ did not provide any other clear and convincing reason for  
27 discounting Plaintiff's complaints, this finding alone is not a proper basis for  
28 the ALJ's credibility determination. See Rollins, 261 F.3d at 856-57; Burch v.

1 Barnhart, 400 F.3d 676, 681 (9th Cir. 2005) (finding lack of objective medical  
2 evidence to support subjective symptom allegations cannot form the sole basis  
3 for discounting pain testimony).

4 Accordingly, the ALJ did not provide specific, clear and convincing  
5 reasons supported by substantial evidence to discount Plaintiff's subjective  
6 symptom testimony. In this instance, the Court cannot conclude that the ALJ's  
7 error was harmless. The ALJ's decision lacks any "meaningful explanation"  
8 based on specific evidence in the record for rejecting any specific subjective  
9 complaint. See, e.g., Brown-Hunter, 806 F.3d at 492 (ALJ's failure adequately  
10 to specify reasons for discrediting claimant testimony "will usually not be  
11 harmless"). In light of the significant functional limitations reflected in  
12 Plaintiff's subjective statements, the Court cannot "confidently conclude that  
13 no reasonable ALJ, when fully crediting the [Plaintiff's] testimony, could have  
14 reached a different disability determination." Stout v. Comm'r, Soc. Sec.  
15 Admin., 454 F.3d 1050, 1055-56 (9th Cir. 2006).

16 **C. State Agency Determinations**

17 Plaintiff also contends that the ALJ failed to consider the State agency  
18 determinations that Plaintiff was not capable of engaging in any of his past  
19 relevant work. (Jt. Sub. at 31.) Plaintiff's remaining claim, which challenges  
20 the ALJ's finding that Plaintiff could engage in his past relevant work at step  
21 four, is implicated by resolution of Disputed Issue Two. As such, the Court  
22 declines to determine the merits as it may be addressed appropriately by the  
23 ALJ as it arises upon further proceedings.

24 **D. Remand is Appropriate.**

25 The decision whether to remand for further proceedings is within this  
26 Court's discretion. Harman v. Apfel, 211 F.3d 1172, 1175-78 (9th Cir. 2000)  
27 (as amended). Where no useful purpose would be served by further  
28 administrative proceedings, or where the record has been fully developed, it is

1 appropriate to exercise this discretion to direct an immediate award of benefits.  
2 See Benecke v. Barnhart, 379 F.3d 587, 593 (9th Cir. 2004); Harman, 211 F.3d  
3 at 1179 (noting that “the decision of whether to remand for further proceedings  
4 turns upon the likely utility of such proceedings”). A remand for further  
5 proceedings is appropriate where outstanding issues must be resolved before a  
6 determination of disability can be made and it is not clear from the record that  
7 the ALJ would be required to find the claimant disabled and award disability  
8 benefits. See Bunnell v. Barnhart, 336 F.3d 1112, 1115-16 (9th Cir. 2003).

9 Here, the Court concludes that remand to the Commissioner for further  
10 administrative proceedings is warranted. On remand, the ALJ shall reassess  
11 Plaintiff’s subjective symptom complaints, reassess Plaintiff’s RFC in light of  
12 the subjective symptom testimony, if warranted, and then proceed through step  
13 four and step five, if necessary, to determine what work, if any, Plaintiff is  
14 capable of performing that exists in significant numbers in the national  
15 economy.

#### 16 IV.

#### 17 ORDER

18 Pursuant to sentence four of 42 U.S.C. § 405(g), IT THEREFORE IS  
19 ORDERED that Judgment be entered reversing the decision of the  
20 Commissioner of Social Security and remanding this matter for further  
21 administrative proceedings consistent with this Order.

22  
23 Dated: February 13, 2018

24   
25 JOHN D. EARLY  
26 United States Magistrate Judge  
27  
28